

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules - Further Competitive)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service to Engage in Fixed Two-Way)	
Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	
Promoting Efficient Use of Spectrum Through)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	

To: The Commission

**PETITION FOR RECONSIDERATION OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

Pursuant to Section 1.429 of the Commission's rules, Hispanic Information and Telecommunications Network ("HITN"), by its attorneys, hereby submits its Petition for Reconsideration ("Petition") of the Commission's Report and Order in the above referenced matter.¹

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order ("*Broadband Services Order*") and Further Notice of Proposed Rulemaking ("*FNPRM*"), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004). A summary of the *Broadband Services Order* was published in the Federal Register on December 10, 2004, 69 Fed. Reg. 72,020.

I. Introduction

HITN, founded in 1981, is a 501(c)(3) non-profit private foundation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN-TV, the first and only 24-hour a day Spanish language public interest television channel in the United States, is presently carried on the Dish Network and the Time Warner Cable Network. HITNet, a satellite-based broadband service delivered via HITN's state of the art satellite platform at the Brooklyn Navy Yard, New York, is currently providing Internet access to the most underprivileged schools and libraries throughout Puerto Rico. HITN also holds over 45 station authorizations in the Educational Broadband Service ("EBS") for facilities throughout the United States and Puerto Rico. HITN's EBS facilities are presently used to provide educational programming, and through a partnership with Clearwire Corporation, advanced wireless broadband services in several markets. HITN, one of the largest holders of EBS authorizations in the United States, has a significant stake in the outcome of this proceeding, and therefore has participated in all earlier facets of this Rulemaking.²

II. Band Plan Transition Issues

HITN is concerned that the FCC's adoption of a transition requirement based on MEAs, rather than the BTAs originally proposed by the MDS/ITFS Coalition, could have the perverse result of slowing rather than speeding up the transition of these frequencies as envisioned by the Commission. Additionally, HITN is concerned regarding the fate of EBS stations that have not been transitioned within the time frame prescribed under the

² See Comments and Reply Comments of HITN filed in response to Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003), 18 FCC Rcd 6722, 6734 (2003) ("*NPRM*").

new rules. The new rules leave open the possibility that EBS licensees could be at risk for losing their authorizations for such stations if, for whatever reason, no transition plan has been filed by a proponent for their market within the allotted three year period. Accordingly, HITN is seeking reconsideration of these two aspects of the transition plan adopted by the Commission.

A. Transition by MEAs

In the *Broadband Services Order*, the Commission adopted a transition plan based on the 51 Major Economic Areas (“MEAs”) within the United States, rather than on the 497 smaller Basic Trading Areas (“BTAs”) previously proposed by the MDS/ITFS Coalition, which are already being used with regard to BRS frequencies within this Spectrum Band.³ HITN seeks reconsideration of this requirement and requests that the Commission instead adopt a transition plan based on BTAs as originally proposed.

In the *Broadband Services Order*, the Commission justified its selection of the MEA as the transition vehicle because it would promote a rapid, even and widespread transition, ensuring predictable business strategies and a rational nationwide market for spectrum, with a reduced risk of a haphazard transition in which certain areas would be passed over for years.⁴ Unfortunately, because the units selected by the Commission are so large, in certain cases encompassing several states, HITN believes that many commercial licensees will be unwilling or unable to design or implement the transition of so many markets and licensees at once. Additionally, HITN fears that many commercial licensees or operators would be unwilling to afford the simultaneous transition of such extensive geographic areas, where they will be unable to convert and implement the

³ See *Broadband Services Order*, at ¶¶ 72 & 82.

transition in accordance with any reasonable and justifiable business plan. Finally, the requirement that transitions occur on such a large geographic and economic scale will almost certainly prevent EBS licensees, even ones as big as HITN, from acting as a proponent or co-proponent in any transition.

HITN believes that the Commission's transition requirements as presently adopted could unintentionally result in a slower, less extensive national transition - just the opposite of what the Commission had envisioned. Accordingly, HITN urges the Commission to adopt the original coalition proposal to transition markets by BTA.

B. Alternative EBS Self-Transition

Under the plan adopted by the Commission, ITFS stations not transitioned within the prescribed three year period would be required to discontinue operations and EBS Licensees could ultimately face the prospect of losing their licenses for such stations. If transitions are to be effectuated by MEAs, or even if on reconsideration the Commission adopts the more reasonable alternative BTA transition proposal, it will be rare for an EBS licensee to act as a proponent in the regional transition process. Thus, the transition of most EBS stations to the new band plan will depend on the business plans, economic resources and schedules of a relatively few commercial operators. HITN seeks reconsideration of the plan to the extent that the authorizations of EBS licensees are placed at risk due to unexpected difficulties and economic issues encountered by the commercial operators attempting these regional transitions. HITN believes that fundamental fairness requires that a self-transition option be put in place for EBS licensees in markets that have not been transitioned within the timeframe provided.

⁴ *Broadband Services Order*, at ¶ 82.

In the *Broadband Services Order*, the Commission stated that in markets where no transition plan is filed, it would not require licensees to “cease existing operations until at least eighteen months after the deadline for proponents to file initiation plans,” but further stated that if a transition is not initiated within three years of the effective date of the rules, the Commission would “use another method of transitioning” for the band.⁵ In its associated *FNPRM*, the Commission suggested that such further transitions following service terminations by untransitioned EBS licensees would be achieved through the adoption of “rules to clear current spectrum assignments from the band.”⁶ The proposal anticipates that untransitioned EBS licensees that lose their authorizations would be provided with “bidding offset credits.”⁷ Such procedures for terminating untransitioned stations would be contrary to the Commission’s position clearly stated within the *NPRM* that it did “not intend to evict incumbent licensees from the affected band,” and that it did “not intend to undermine the educational mission of ITFS licensees.”⁸

HITN believes that the Commission’s rules, as adopted, and as it proposes to modify them, might yield an unanticipated incentive for an operator to delay transitions in certain regions within the three year timeframe if it believed that it would be cheaper to transition the band after the FCC cleared the Band of untransitioned licensees. Further, HITN believes that, having created a transition method on a scale beyond the reasonable economic means of individual EBS licensees, it would be manifestly unfair for the

⁵ *Broadband Services Order*, at ¶¶ 81 & 83.

⁶ *FNPRM* at ¶ 290.

⁷ *Id.*

⁸ *NPRM* at ¶ 2.

Commission to then punish well-meaning and otherwise compliant licensees for any inability or failures of commercial entities to transition the band within the allotted timeframe. Accordingly, the Commission should adopt and make available to untransitioned EBS licensees a self-transition option at the conclusion of the three-year period.

Under such an option, in any market where a proponent has not filed an initiation plan by the required date, an untransitioned EBS licensee should be permitted to state within some period of time that it intends to self-transition. Naturally, EBS licensees failing to file such a statement would be subject to the alternative transition mechanisms now being considered by the Commission and could ultimately be forced to accept bidding offset credits in exchange for their licenses. However, licensees that choose the self-transition option and file the requisite notice would retain their existing authorization. Self-transitioning EBS licensees, by a deadline to be established by the Commission, and presumably coinciding with the termination of existing EBS high power operations by untransitioned EBS licensees, would be required to terminate high power operations on applicable LBS or UBS channels, but would be allowed to continue high power operations on their authorized MBS Channel under the new band plan.⁹

III. Geographic Area Licensing

HITN generally supports the Commission's adoption of a geographic licensing scheme, even for EBS channels located in the MBS. Such a scheme will allow licensees to modify their stations, including relocation of transmit facilities, within their GSAs without prior Commission authorization as long as their operations comply primarily

⁹ An EBS licensee would also be free at that time to retune a transmitter to initiate high power operations on their designated MBS channel, in cases where such designated channel had not been part of their authorization under the old band plan.

with power flux density restrictions at their GSA boundaries. However, HITN has observed that in relocating high-powered stations from previously collocated facilities, interference can occur in the existing receive sites of adjacent-channel stations located within close proximity of the relocated transmission facilities. Prevention of such adjacent-Channel interference occurring roughly within the same, rather than to an adjacent, GSA was not addressed in the rules adopted by the Commission. In practice, HITN has found that claims of predicted interference within a GSA can be used in bad faith to unreasonably obstruct necessary relocations of high-powered stations. However, where legitimate occurrences of actual interference are identified at existing receive sites of adjacent-channel stations within the same GSA, HITN believes that it would not be unreasonable to require the EBS Licensee effectuating the relocation to undertake to provide needed filters at the affected existing receive sites of such stations.

IV. Affect of EBS License Forfeitures on BTA Holders

In the *Broadband Services Order*, the Commission stated that where an existing license is cancelled or forfeited, “the right to operate in that area automatically reverts to the licensee that holds the corresponding BTA License.” However, the Commission makes no distinction regarding spectrum associated with EBS licenses that may be cancelled or forfeited. It also appears that the language in Section 27.1209(c) fails to draw a distinction between cancelled EBS and BRS authorizations in this regard. Commercial BTA authorizations do not presently include spectrum on frequencies allocated to the EBS service. HITN seeks clarification that non-commercial EBS licenses that are cancelled or forfeit would not suddenly become part of a BTA holder’s commercial BRS spectrum. Such an interpretation would be inconsistent with the

Commission's position within the *Broadband Services Order* that it is in the public interest to preserve this spectrum for licensing to EBS-eligible entities, and that doing so will further the educational objectives that led to the establishment of EBS.¹⁰ Such an interpretation would also be inconsistent with the retention EBS eligibility restrictions as they pertain to white area auctions, and the sale of existing EBS stations.¹¹ HITN therefore requests that the Commission clarify that where an EBS license is cancelled or forfeited, such frequencies will be made available for application and auction only to entities otherwise eligible to be licensed in the EBS service.

V. EBS Four Channel Restriction

While the Commission, as part of its FNPRM has sought comment on whether to retain the four channel rule in markets that have not yet been transitioned, Section 27.5(i)(3) of the rules adopted by the *Broadband Services Order* seems to further restrict EBS licensees to only four channels, one of which would now have to be in the MBS. Although HITN has previously favored the four-channel rule, HITN believes that the purpose of the four-channel rule has been largely overtaken by the evolution of services in these bands and exceptions routinely meted out by the Commission and therefore should be stricken in its entirety.

Historically, the FCC has given out waivers quite frequently to licensees showing even a modest desire, if not documented need, for additional channels within a market. Further, many licensees hold multiple authorizations within a market where certain authorizations are used point-to-point for various transmission needs. Additionally, many licensees hold individual channels and channels pairs associated with multiple channel

¹⁰ *Broadband Services Order*, at ¶ 152.

¹¹ *Broadband Services Order*, at ¶ 162 and *FNPRM* at ¶ 266.

groups within a single market. Under the new rules, EBS licensees will need flexibility to swap and assign channels where appropriate to address their needs for additional MBS channels or contiguous LBS channels as may best suit their educational needs. Further, where an entity is attempting to develop and provide educational broadband as well as traditional video services simultaneously to area schools, it would best serve the public interest to allow such entity to hold multiple EBS licenses within a market. Accordingly, HITN urges the Commission to delete Section 27.5(i)(3) in its entirety, and impose no restrictions on the number of EBS channels a qualified licensee may hold in a market.

VI. Conclusion

HITN respectfully requests that the Commission reconsider and clarify its Broadband Services Order and the Rules adopted thereby in accordance with the discussion set forth herein.

Respectfully submitted,

HISPANIC INFORMATION AND
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January 10, 2005

CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing Petition for Reconsideration of Hispanic Information and Telecommunications Network, Inc. were served this 10th day of January, 2005 on the following parties via first class mail of the United States Postal Service, postage prepaid, to the following addresses:

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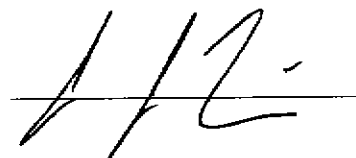
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